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In The
SUPREME COURT OF THE UNITED STATES

No. 1215

JAMES RODNEY JONES
Petitioner,

vs.

THE UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

James Rodney Jones, petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered on the 4th day of September, 1969 in causes numbered 223-68 and 224-68 in that court.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Tenth Circuit was entered on the 4th day of September, 1969. Rehearing was denied on January 6, 1970. On February 5, 1970, Mr. Justice Byron White granted petitioner an extension of additional time in which to file this petition, granting leave for filing until February 15, 1970. The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1).

STATEMENT OF CASE

James Rodney Jones and Loyd Allen Reid, hereinafter called defendants, were charged by indictment duly returned by a grand jury with burglarizing a building which was being used as a post office. Title 18 U.S.C. 2115. R. 131.

The defendants at their arraignments filed a Motion to Suppress the evidence which consisted of certain property allegedly taken from said post office and defendant's automobile on the grounds that search and seizure was unlawful. R. 132.

After hearing the evidence, the Court overruled the Motion to Suppress.

On August 1 and 2, 1968 said cause came on for hearing before the Court with a jury impanelled to try the facts. After hearing the evidence the jury returned a verdict of guilty as to both defendants and on the 6th day of September, 1968 each defendant was sentenced to three (3) years confinement.

From which judgment and sentence both defendants appealed.

The Tenth Circuit Court of Appeals affirmed the convictions on September 4th, 1969. Re-hearing was denied on January 6, 1970.

The defendant James Rodney Jones, hereinafter referred to as petitioner, appeals to this court for issuance of a writ of certiorari.

QUESTIONS PRESENTED

1. "Was there sufficient evidence of probable cause shown to the trial court from which the court could determine that the arresting officers had a genuine belief that the law was being violated?"

2. "Was the search of the vehicle conducted under circumstances that would bring it within an exception to the law requiring a search warrant?"

3. "Was it error for the trial court to overrule defendant's motion for a mistrial when the prosecuting attorney commented on the defendant's failure to produce evidence?"

4. "Was it error for the Circuit Court to disregard the trial court's interpretation of the prosecuting attorney's remarks on the defendant's failure to testify?"

5. "Does the misconception of the Circuit Court as to the defendants' having made a motion for a mistrial reflect an inadequate study of the facts of the trial of this case and the points raised on appeal point up a valid basis for certiorari to issue in this matter?"

Howard Chamberlain as his testimony pertains to this appeal:

EVIDENCE

Howard Chamberlain testified he was a Lieutenant on the Police Department, Paris, Texas, with twenty-one years service, that he was on patrol duty with a Patrolman Long on the morning of March 10, 1968. That they arrested the defendants Reid and Jones in Paris, Texas on this date. That this arrest was without warrant and that a search of defendant's automobile was made without search warrant.

Pertinent parts of Lt. Chamberlains testimony follows:

TR. 34

"Q. Now, you say you picked up these two people in the Park. Could you describe the circumstances, what caused you to pick them up?

THE COURT: Just tell us what happened, Lieutenant.

A. Well, we was just on routine patrol and drove through this park and they were in a car that had an out-of-state tag on it that was out-of-date.

MR. BOATMAN: Your Honor, now, it the court please, I want to object to that last statement because that calls for a conclusion.

THE COURT: Overruled.

MR. SMALLEY: On behalf of the defendant James Rodney Jones I would like to concur in the objection and have the objection repeated.

THE COURT: Overruled.

Q. Go ahead, please, Lieutenant.

A. They were in a 1957 Chevrolet that had Arkansas tags on it that were out-of-date.

THE COURT: Well, describe the tags.

THE WITNESS: Do you mean the color of them, sir?

THE COURT: No, why do you say they were out-of-date?

THE WITNESS: Well, Arkansas tags expire December 31st.

MR. BOATMAN: Your Honor, now if the Court please, I object to this statement because it calls for a conclusion.

THE COURT: Just tell us what it was about the tag that lead you to believe they were out-of-date.

A. 1967.

Q. Would you go ahead and continue with what happened after you saw the license tags, please.

A. We pulled around, Mr. Jones was in the front seat and Mr. Reid was in the back seat of the car. We got out of our car and walked over to theirs and told them that their tags were out-of-date. They would have to go down to the station with us and get their business straightened up or get theirs set straight. (TR 43-45)

CROSS EXAMINATION

Q. Now, Lieutenant Chamberlain, let me try to refresh your memory here just a little bit on one item, understand me I am not arguing with you at all. Now, if I understand correctly when you went to the—got to the Police Station you went in and you were counting the money in the box and these two boys were sitting around there somewhere in your presence in the Police Station, is that about right?

A. That's about right.

Q. And while you were sitting there counting the money and your partner, Mr. Long, was there with you, another policeman came in and said, "Say, that car out there is loaded with burglary tools." And you said, "Well, go get them and bring them in, then." Isn't that right; isn't that what happened?

A. It's possible that some of the boys may have said that, yes.

Q. And you said go get them and bring them in?

A. Well, I probably did, but Mr. Long—

Q. Then they went out and got this bar and the hammer and some more tools and brought them in, is that right?

A. I am pretty sure that is right.

Q. All right. One other question. Now, I believe you said, "What's in the glove compartment?" And one of the boys said that there is a cigar box full of money or something like that?

A. That's right.

Q. So, you said, "Well, get it out so I can see." And he got it out and showed it to you?

A. That's right.

Q. And then what did he do with the money?

A. I believe James put it back in the glove compartment.

Q. Put it back in the glove compartment and closed the door?

A. He got out and I searched him.

Q. He got out and you searched him. Well, then, do you know when and where or who later on got the money out of the car?

A. The money was either carried in the back, the money and the two guns were either put in the deck lid of our car or it was brought in in that particular car that it was in, I wouldn't say which one.

Q. In other words, Lieutenant, you don't know when the money was taken out of the car for sure and exactly how it got into the Police Station?

A. It was carried in the Police Station as we went in.

Q. I beg your pardon?

A. It was carried in the Police Station, the money was never left alone, if that's what you are trying to say.

Q. No, I'm not trying to say anything. I'm trying to find out from you exactly what happened.

A. Well, Bill or I or one was in possession of that money at all times from the time they were put under arrest until they seen it counted.

Q. I see. When you got them out of the car and shook them down, is that when you put them under arrest?

A. No, they were told before they were taken out of the car that they were under arrest.

Q. How did you tell them?

A. I told them they had illegal tags, out-of-date tags on that car.

Q. I see. Now, what time do Texas tags expire, Lieutenant?

A. I believe they expire December 31st.

Q. Texas tags expire December 31st?

A. I believe so.

Q. It doesn't become an offense in Texas to drive a tag, a car with a previous year's tag until April 1st, does it?

A. No. Sir.

The defendant, James Rodney Jones testified in part as follows (on direct examination in the hearing on his Motion to Suppress):

Q. Were you in Paris, Texas, on March 10, 1968?

A. Yes, I was.

Q. Where were you at approximately six thirty in the morning on that day?

A. We were asleep in a car at a roadside park on the west side of town.

Q. You say we, who was with you at that time?

A. Myself and my brother-in-law Loyd Reid.

Q. All right, sir. Did anything out of the ordinary occur at that time?

A. Yes. A police car pulled up and these two officers got out and told us that we had an expired tag on the car and wanted to know if we knew it. Then he told me to open the glove box and see what was in it. When I showed him that cigar box he told me to take it out.

Q. Mr. Jones, let me ask the questions and you give the answers.

A. All right.

Q. Did you then open the glove box?

A. Yes, I did.

Q. And what did you remove from it?

A. The cigar box.

Q. Is it the cigar box that has been marked Plaintiff's Exhibit 1 that you have heard us discuss earlier?

A. Yes, it is.

Q. And what did he ask further of you?

A. Told me to open it, and after I opened it he told me to put it away.

Q. And did you do that?

A. Yes, I did.

Q. And where did you put it?

A. I put it back in the glove compartment.

THE DECISION OF THE COURTS BELOW

The opinion of the Tenth Circuit Court of Appeals appears at page i of the Appendix. It is reported at ——F.2d——. No opinion was rendered by the trial court in the Eastern District of Oklahoma.

REASONS FOR GRANTING THE WRIT

PROPOSITION I

The arrest of the defendants for improper automobile registration appears to be a subterfuge for the purpose of searching the defendant's vehicle.

The policeman testified that the 1967 Arkansas tag on this vehicle had expired. he also testified that a 1967 Texas tag would have expired but the use of said tag would not constitute an offense. It might be that the officer would have testified upon inquiry that the operation of a vehicle with an expired Arkansas tag was a law violation. In *Brinegar v. United States,* 380 US 160; 69 S.Ct. 1302, 93 L.Ed. 1879; the Supreme Court stated that probable cause means more than a bare suspicion and exists when the facts within the knowledge of officers are sufficient to warrant a man of reasonable

caution in the belief that a offense has been or is being committed. Evidence of whether these defendants were charged with operating a motor vehicle without proper registration and if such charge was filed, when it was filed, and the disposition might throw some light upon whether this was a good faith arrest or a witch hunt. Further, even if the officer believed there was a violation and this was true in fact, does the officer automatically have the right to arrest and make a search?

The reasonableness of this action is for the court's determination from the evidence as presented on how the matters appear to the officers at the time. *Johnson v. United States,* 333 U.S. 10, 13, 68 S.Ct. 367, 369, 92 L.Ed. 436; *United States v. Lefkowitz,* 285 U.S. 452, 464, 76 L.Ed. 877, 882, 52 S.Ct. 420.

PROPOSITION II

If the arrest was based upon probable cause does this automatically give the officer the right to search? If so, to what extent? And for what?

It is accepted that we must be bound by the Texas law regarding probable cause. The Texas statutes allow an officer to arrest for traffic violations in his presence and to search the automobile. But this right is tempered by the 4th and 14th Amendments to the Federal Constitution. In the case of *Amador-Gonzales v. United States,* 391 F.2d 308 (1968) 5th Cir., the defendant was observed making numerous left turns and speeding, he was stopped by the officers for this violation and a search of his automobile produced a certain amount of narcotics.

> The court in deciding this case found that the real purpose of the arrest was to search the automobile. Therefore, we would conclude that an arrest for a

traffic violation does not always give officers a right to search. The question to be answered in the present case is, were the circumstances as they existed on the morning of March 10, 1968, such that the officers believed that a crime was being committed in their presence and was this the real reason for the arrest? The reasonableness of this is for the court's determination.

However, if it is concluded that probable cause for the arrest did exist then we are faced with the question of for what purpose or how extensive can the search be.

A search incident to an arrest must have as one or more of its purposes the discovery of (1) the fruits of the crime; (2) instrumentalities used to commit the crime; (3) weapons or like material which put the arresting officer in danger or might facilitate escape; (4) contraband, the possession of which is a crime (Preston v. United States, 1964, 376 U.S. 364, 367, 84 S.Ct. 881, 883, 11 L.Ed. 2d 777; Agnello v. United States, 1925, 269 U.S. 20, 30, 46 S.Ct. 4, 70 L.Ed. 145), and, by a recent decision, (5) material which constitutes evidence of the crime or evidence that the person arrested has committed it (Warden v. Hayden, 1967 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed. 2d 782).5

In examining these five elements it is difficult to believe that tools to repair automobile tires or a cigar box of money could possibly come within either category.

In the case of *Carroll vs. United States*, 267 U.S. 132, the Supreme Court pointed out that usually a search warrant is not necessary to establish a valid search of a vehicle which is mobile. In that case the Court stated,

"The guarantee of unreasonable searches and seizures by the 4th Amendment has been con-

> strued, practically since the beginning of the Government as recognizing the necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant may be obtained and a search of a ship, motorboat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant because the vehicle can quickly move out of the locality or jurisdiction in which the warrant must be sought."

However, when this mobility factor is lost, and the vehicle is no longer in a mobile state, then a warrant must be obtained before searching the vehicle, in order to constitute a reasonable search under the 4th Amendment. In the case of *Rent et. al. vs. United States*, 209 Federal 2nd 893; rehearing denied, the Defendants were arrested at 11:50 P.M., and their automobile taken to the Houston Police Department parking lot and locked. The Defendants were placed in jail, and on the following morning the officers searched the automobile. The United States Court of Appeals for the 5th Circuit cited the Carroll case and said that the reason for the difference quoted from the Carroll case, which allowed a valid search of a vehicle without a warrant in certain cases, does not exist in this case. The Court stated,

> "The automobile was at rest, was actually in the custody of the officers, locked and not likely to be disturbed.
>
> We think that one of the facts and circumstances to be considered in this case is the fact that there was no reason for not submitting to a Magistrate the evidence which the officer deemed sufficient to justify a search warrant and in our opinion a search of the automobile without a search warrant was not justified."

Again in *Hart vs. United States,* 162 Federal 2nd 74, where an automobile was searched while standing in a garage, while there was no one in it or threatening to move it, here also, the automobile was not in the possession of the Defendant, as he had been arrested and was in jail. The Circuit Court of Appeals for the 10th Circuit said,

> "There is a complete lack of showing that any circumstances existed which made the obtaining of a search warrant impractical."

Defendants contend there was no evidence entered in the case at bar to show any such circumstances.

The case of the *United States vs. George Stoffey,* 279 Federal 2d 924, involved prosecution for attempting to evade the excise tax on wagers, and to evade the wagering occupational tax, and other criminal violations. In that case the agents of the Internal Revenue Service had a search warrant for the person of the Defendant and a search warrant for his place of business. At 11:50 o'clock A.M. on the day in question, the Defendant drove up in his auotmobile and parked it in front of his place of business and then went inside where the Internal Revenue Agents and other police officers were waiting for him and subsequently placed him under arrest and took his keys, then the agents seized and searched the Defendant's automobile. The United States Court of Appeals for the 7th Circuit held that not only was the automobile here searched, not in movement and not occupied by the Defendant at the time of the search, but further that the Government Agents had made it impossible for Defendant to drive it away, and that under these circumstances a search of the automobile was unreasonable.

In the case presently before the Court, as in the Stoffey case the police officers of the City of Paris had made it impossible for the Defendants to drive away the automobile which was searched, in that they had placed the defendant in the Paris jail, and they had the automobile in their sole possession and control. Under the facts and circumstances of the present case, the search of the automobile was unreasonable and therefore in violation of the freedom guaranteed under and by virtue of the 4th and 14th Amendments to the United States Constitution.

The trial court seemed quite uncertain as to the sufficiency of the evidence on the reasonableness of the search, as is evidenced by the following exerpt from the transcript of hearing on petitioner's Motion to Suppress, pages 38-39:

MR. SETTLE: If the court please, it will be the contention of the Government that this was a search incident to arrest. These defendants were under arrest at the time that Mr. Chamberlain told them they were taking them to the station and told them to get out of the car, as testified by the Government's witnesses and the defendant himself, Mr. Jones.

In addition—

THE COURT: Let's take the cigar box first. Now, when they walked up to them they told them the licenses seemed to be expired.

MR. SETTLE: That's correct, Your Honor.

THE COURT: And they would have to go down to the station and get that cleared up.

MR. SETTLE: Yes sir.

THE COURT: But then he had him show him what was in the box.

MR. SETTLE: Yes, Your Honor.

THE COURT: In the glove box. And then he had him put it back. Now, what I am disturbed about, he looked in it and having seen there wasn't anything dangerous to him, what right did he have to go back in the glove compartment and get this box?

MR. SETTLE: Well, if the court please, that part wasn't testified to as to why they went back.

THE COURT: That's right.

MR. SETTLE: And got the box. There was a reason, of course, it was not testified to because I didn't feel it was relevant to the issues as I thought that the man was under arrest prior to the time the box came out and since he had seen it and put it back, I didn't feel there was an illegal search to go back again and pick it up as he was trying to get the men out of the car and also frisk them for weapons.

THE COURT: Now, he had satisfied himself so far as his safety was concerned, and that would be the only thing that would justify that. After all there aren't any fruits of an expired license.

MR. SETTLE: Yes, Your Honor.

THE COURT: So, the only justification for looking into the box was for his own safety, I mean looking into the glove compartment. Having done so and assured himself there wasn't any weapon there and having put it back, what right did he have to go back and get it? Unless he suspected, or had probable cause to believe that that box might be related to some other problem.

MR. SETTLE: He did, Your Honor, but as I said that wasn't testified to.

THE COURT: That's right. At any rate the testimony was that after they found the weapons they went back and got the box and put it in the police car.

MR. SETTLE: Yes, Your Honor.

THE COURT: Is that what happened

MR. SETTLE: That is the testimony.

There was insufficient evidence of reasonableness and probable cause at the hearing on the Motion to Suppress and there was no further evidence adduced at the time of the trial. The arresting officers could not have been resuming the search for fruits of a recent crime when they returned to the glove compartment of the petitioneer's car because the crime the box was connected to later was not discovered until some two hours after this arrest was made. (TR-10)

PROPOSITION III

Was the comment by the United States Attorney to the effect that the defendant had not produced evidence prejudicial?

The remark was "Now, they haven't told us how the defendants got the box marked "Old Fort" yet, either Mr. Smalley or Mr. Boatman". TR 110.

It seems we established that any comment by counsel for the defense as to how the defendants got the box would be error since there was no evidence to base any explanation upon.

It appears in the case of *Hood v. United States*, 59 F 2nd 153 153 (1932) that the court said at P. 155 "But it does not appear that no other testimony was available to contradict the witness." In the instant case it is evident that the defendants were the only witnesses available for this purpose. The Tenth Circuit Court also said in the Hood case referring to a similar remark, P. 155 "if the prosecuting attorney made such a comment and it was not condemned by the court, it was reversible error." The condemnation of the court was, "Now Mr. Cate, this is strictly improper and you will depart from it immediately and I will instruct the jury in this regard in my instructions". P. 110 Motion for a mistrial was made and overruled P. 112. How could the effect of the most cogent statement made by the United States Attorney in all of his argument be disregarded or cured by this admonition? The trial court went to great length to cure this error in the instructions to the jury, but the instruction as given only pointed up the failure of the defendants to produce evidence.

In the case of *George C. Desmond, Appt., v. United States*, 345 F 2nd 225 (1965) the prosecutor said, "Those are the facts, the evidence. Incidentally, may I say to you that the evidence stands unimpeached and uncontradicted." The court overruled the objection to this statement and said he would charge the jury on this matter in his instructions and did give such instruction. The court said, "If it be assumed that the government's argument constituted comment upon appellants failure to testify, was it cured by the charge? We think not. Correction of error should be as prompt and timely as possible—nor can we doubt that the government's statement—constituted improper comment." The case was reversed because of this statement.

In the case of the *Griffin v. California*, 380 U.S. 609, 14 L.Ed. 2nd 106, 85 S.Ct. 1229, the court after pointing out that this is an application of the 5th Amendment by way of the 14th comes to the conclusion that state laws allowing comment on defendants failure to take the stand unconstitutional. In this case the prosecutor said among other things, "These things he has not seen fit to take the stand and deny or explain." The court said, "If this were a federal trial, reversible error would have been committed." The court also in this case was considering comments of the same order by the court, but it seems clear that either was error.

PROPOSITION IV

Was it error for the Circuit Court to disregard the trial judge's interpretation of the prosecutor's remarks, when the trial court judge heard the words uttered and heard their inflection and saw the jury's reaction to the statement?

Although the Circuit Court recognized in its opinion that the trial court sustained a defuse objection to the statement *on the ground that it was a comment on the failure of the defendants to testify,* the Circuit Court went on to say, in the same paragraph of its opinion that it did not "think the statement was intended to or had the effect of emphasizing the failure of the defendants to testify."*1*

The trial court was unquestionably convinced that the remarks were directed to the defendants failure to produce evidence. Its admonition to the prosecutor after sustaining the defense objection was as follows:

(TR-110:)

*1*Appendix, page iii, iv.

MR. CATE:

Now, they haven't told us how the defendants got the box marked "Old Fort" yet, either Mr. Smalley or Mr. Boatman.

MR. BOATMAN: Your Honor, if the court please, may I approach the bench?

THE COURT: It is not necessary for you to approach the bench. You want to object to this line of argument?

MR. BOATMAN: Yes sir.

THE COURT: Now, Mr. Cate, this is strictly improper and you will depart from it immediately and I will instruct the jury in this regard in my instructions.

MR. CATE: Yes.

THE COURT: I'm telling you now, don't ever do it again in this courtroom.

(TR-110)

MR. BOATMAN: Could we approach the bench?

THE COURT: Yes.

(Whereupon the following proceedings were had at the bench between the court and counsel outside the hearing of the jury.)

MR. BOATMAN: Comes now the defendant Reid and moves the court to grant a mistrial because of the remarks made by the government's attorney with reference to the defendant's failure to produce evidence in this case.

THE COURT: Make your objection.

MR. SMALLEY: We adopt the request of the defendant Reid on behalf of the defendant James Rodney Jones.

THE COURT: Well, he hadn't gone very far and I intend to instruct on that matter. The defendants have heretofore indicated that they wanted an instruction on failure to take the stand, which I intend to give, and I believe that I can correct the error in my instructions, so I am going to deny your motions for mistrial.

But, Mr. Cate, you ought to know better than to come in on their failure to produce evidence in a criminal case.

MR. CATE: May it please the court—

THE COURT: No, I don't want to hear any more about it.

PROPOSITION V

"Was the Circuit Court's misconception that the defendants did not move for a mistrial, on the district attorney's comment on their failure to testify, indicative of an inadequate understanding of the facts of the trial of this case for it to render its opinion affirming judgment?"

In the last paragraph of its opinion the Circuit Court stated, as part of its reasoning for rejecting petitioners contention that prejudicial error was committed, that *"No motion for a mistrial was made."*

The petitioner *did* move for a mistrial on the first occasion he was allowed to after the comments were made. The motion for a mistrial appears in the trial record at page 112 and is set out in petitioners Proposition IV, supra.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be granted.

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Filed United States Court of Appeals, Tenth Circuit, Sep. 4, 1969. William L. Whittaker, Clerk.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JULY TERM—1969

Nos. 223-68 224-68

UNITED STATES OF AMERICA
Appellee,

v.

LOYD ALLEN REID and JAMES RODNEY JONES,
Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

(No. 27647 Cr.)

Joe R. Boatman, Muskogee, Oklahoma, for Appellant Reid.
Bill Smalley, Muskogee, Oklahoma, for Appellant Jones.
Clifford K. Cate, Jr., Assistant United States Attorney, Muskogee, Oklahoma (William J. Settle, United States Attorney, with him on the brief) for Appellee.

Before PICKETT, HILL and HICKEY, Circuit Judges.

PICKETT, Circuit Judge

Appellants, Reid and Jones, were jointly charged, tried and convicted for burglarizing the United States Post Office in Fort Towson, Oklahoma in violation of 18 U.S.C. § 2215. The principal question raised in this appeal relates to the admissibility of a small box containing money and an iron tool taken from the automobile in the possession of Reid and Jones at the time of their arrest in Paris, Texas.

A pretrial hearing on a motion to suppress the evidence developed these pertinent facts: The Post Office at Fort Towson, Oklahoma was burglarized during the night of March 9-10, 1968. The following morning police officers at Paris, Texas, a distance of about forty miles from the scene of the burglary, were on routine patrol duty when they observed an automobile with 1967 Arkansas license plates parked in a city recreation area. After confirming that the license plates had expired, the officers approached the auotmobile and informed Reid and Jones, who had been asleep therein, that they were being taken to the police station because of the expired license plates.*1* One of the officers directed Jones, who was in the front seat, to open the glove compartment.*2* Jones produced a cigar box which contained a substantial quantity of money. After examination the box was returned to the glove compartment. At the direction of the officers, Reid and Jones got out of the automobile and were "frisked" to determine if they had firearms. When the front door was opened some heavy tools, including a bar, were observed by the officers on the floor of the automobile. A further examination of the vehicle, which was not a general search, disclosed two revolvers underneath the front seat.

Reid and Jones, together with their automobile, were then taken to the police station. The money box and the

*1*The testimony of one of the officers was to the effect that Reid and Jones were placed under arrest upon their arrival at the automobile. Jones testified that the officers did not tell them that they were under arrest but this was indicated when "he got us out of the car and shook us down."

*2*One of the officers testified that the opening of the glove compartment in automobiles under these circumstances was usually required to determine if firearms were concealed there.

tools were removed and taken to the station. Later in the day a postal inspector identified the cigar box as one taken from the burglarized post office at Fort Towson, Oklahoma. At the trial, the cigar box and the money were introduced in evidence, as was the iron bar taken from the automobile. An expert identified the iron bar as the one used to open the Fort Towson Post Office safe.

We agree with the trial court that the arresting officers had probable cause for making the arrest of Reid and Jones for operating an automobile on an expired license; and, that the search made after the lawful arrest was incidental thereto and not unreasonable. The case before us is quite similar to Welch v. United States, 10 Cir., 361 F 2d 214, *cert. denied*, 385 U.S. 876, where a similar search, including that of the glove compartment, was sustained. The *Welch* case reviews decisions of this court and of the United States Supreme Court upholding the right of an officer, after a lawful arrest, to search the automobile occupied by the arrested persons and the admissibility in evidence of discovered articles under the immediate control of those arrested. In United States v. Humphrey, 10 Cir., 409 F.2d 1055, we discussed the reasonableness of searches of automobiles after a lawful arrest for the commission of a minor offense by the person in possession of an automobile, and sustained the admission in evidence of article seized. The Constitution does not forbid all searches and seizures but only those which are unreasonable. Terry v. Ohio, 392 U.S. 1, 9; Elkins v. United States, 364 U.S. 206, 222.

After completion of the closing arguments by the attorneys for Reid and Jones, government counsel in final summation stated: "Now they (counsel for defendants)

haven't told us how the defendants got the box marked 'Old Fort' (the cigar box) yet, either Mr. Smalley or Mr. Boatman (counsel for the defendants)." Subsequently the court instructed the jury at length concerning the effect of the defendants' failure to testify. No motion for a mistrial was made. The trial court sustained an objection to the statement on the ground that it was a comment on the failure of the defendants to testify. Appellants urge that a new trial should be granted because the statement was in effect a comment to the jury on the failure of the defendants to testify. This is not a case where the comment of the prosecutor directly and unequivocally called attention to the failure of the accused to testify, as in Griffin v. California, 380 U.S. 609; and Collins v. United States, 10 Cir., 383 F.2d 296. Nor is this a case where the jury would naturally and necessarily understand the statement to be a comment on the failure of the accused to testify, as in Knowles v. United States, 10 Cir., 24 F.2d 168. When considered in context, the statement appears to be in answer to arguments made by defense counsel and counsel's attack on the credibility of government witnesses. We do not think the statement was intended to or had the effect of emphasizing the failure of the defendants to testify. See Young v. United States, 10 Cir., 168 F.2d 242, *cert. denied*, 334 U.S. 859; United States v. Heithaus, 3 Cir., 377 F.2d 484.

Affirmed

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In the Supreme Court of the United States

OCTOBER TERM, 1969

JAMES RODNEY JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1215

JAMES RODNEY JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of Oklahoma, petitioner and one Reid were convicted of burglary of the United States Post Office in Towson, Oklahoma, in violation of 18 U.S.C. 2115. Petitioner was sentenced to three years' imprisonment. The court of appeals affirmed (Pet. App.).

1. Petitioner's principal challenge is to the denial of his pre-trial motion to suppress evidence of a small

box containing money and an iron bar, taken from the automobile in which he and Reid were found at the time of their arrest. As related in the opinion below (Pet. App. ii-iii), the evidence developed at the hearing on the motion to suppress showed that the post office in Towson, Oklahoma, was burglarized on the night of March 9-10, 1968. The next morning, in Paris, Texas, approximately 40 miles from Towson, Lieutenant Chamberlain and Patrolman Long of the Paris police department, while on routine patrol duty, observed an automobile with expired Arkansas license plates [1] parked in a city recreation area. The officers approached the car and told petitioner and Reid, who had been asleep inside (petitioner was in the front and Reid was in the rear), that they would have to accompany the officers to the police station because of the expired license. One of the officers testified that Reid and Jones were placed under arrest at that time while they were in the car. Lieutenant Chamberlain asked the men what was in the glove compartment. One of them said that there was a cigar box full of money. At Chamberlain's request petitioner opened the glove compartment, showed the box to the officers, and then returned it to the glove compartment. The officers thereupon directed petitioner and Reid to get out of the car, and they were frisked for weapons. When the front door was opened, the officers saw some heavy tools, including an iron bar, on the floor. A further exami-

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[1] This was an offense under Arkansas law. See Sec. 75-201(l), Ark. Stat. Ann. (1947).

nation of the vehicle uncovered two revolvers underneath the front seat.

Petitioner, Reid, and the automobile were then taken to the police station, where the box containing money and the tools were removed. At trial the cigar box (which had been taken from the burglarized post office) and the iron bar (which an expert testified had been used to open the post office safe) were introduced into evidence.

There is no support in the record for petitioner's contention that there was an unlawful search of the car which revealed the cigar box and iron bar, and that the traffic arrest was utilized as a mere pretext to search. The evidence shows that the officers' request to have the glove compartment opened was a usual and necessary measure for their own protection against concealed firearms (See Pet. App. ii, n.2). The fact that the incriminating contents of the box were disclosed did not make the officers' request unreasonable or prevent the later seizure of the box. See *Terry* v. *Ohio*, 392 U.S. 1; *Chimel* v. *California*, 395 U.S. 752; *Welch* v. *United States*, 361 F. 2d 214 (C.A. 10), certiorari denied, 385 U.S. 876. Similarly, since the officers had a right to be in the position they were when the door of the car was opened, revealing the tools on the floorboard, the subsequent seizure of the iron bar was lawful. See *Harris* v. *United States*, 390 U.S. 234.

2. Petitioner also argues that there was prejudicial comment on his failure to testify in the following statement in the prosecutor's summation: "Now

they [counsel for defendants] haven't told us how the defendants got the box marked 'Old Fort' [the cigar box] yet * * *" (Pet. 15). An objection was sustained by the trial judge on the ground that it was a comment on the failure of the defendants to testify, but a motion for mistrial was denied.[2] Thereafter the court instructed the jury that the defendants' failure to take the stand could not be considered as showing their guilt. It is clear, as the court below held, that the prosecutor's remark was not intended, nor would the jury interpret it, as constituting a comment on the defendants' failure to testify. It did not require testimony by petitioner or his co-defendant for defense counsel to furnish a theory to explain the presence of the cigar box filled with money in the car. There was, therefore, no prejudice in these circumstances justifying a new trial.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1970.

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[2] The court of appeals indicates in its opinion that no such motion was made (Pet. App. iv). The court, however, did not rely on this assumed lack of a motion for mistrial in reaching its conclusion that the comment was not prejudicial.

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